NO. 393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. OF L., LOCAL 68; AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. OF L., LOCAL NO. 3

MEMORANDUM FOR RESPONDENTS

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MEMORANDUM FOR RESPONDENTS

Respondents do not oppose the grant of certiorari herein in the event this Court should conclude that there is a substantial conflict between the decision below and that of the Court of Appeals for the Second Circuit in *International Brotherhood of Electrical Workers* v. *N. L. R. B.* 181 F. (2) 34. However, it is questionable whether there is such a conflict. In the present case Respondents had never been able to organize Gould and Preisner, the electrical subcontractors (R. 220-221; 132) and picketed and boycotted the job for that purpose *while the non-union electricians were on the job.* This activity was thus *primary* in char-

acter. On the other hand, in the *Electrical Workers* case *supra*, the non-union electricians *were not on the job* at the time of the picketing. Chief Judge Learned Hand pointed this out:

> "The work of the employer may be so enmeshed with that of the third party that it is impossible to picket one without picketing the other. The case at bar might have been of that sort, *had Langer's non-union employees been at work on the job*, and Patterson's only purpose been to induce them to quit." (*Int. Broth. of Electrical Workers* v. *N. L. R. B.* 181 F. (2) 34, 37. Italics ours).

We think the above distinction adequately differentiates the two cases. If so, while certiorari might readily be granted in the *Electrical Workers* case (on its own merits), there is no need to grant it in the present case, wherein the decision seems essentially right. Sec. 8 (b) (4) (A) of the Taft-Hartley Act cannot be distorted into class legislation aimed at the craft unions which can picket and otherwise exert lawful pressure only at the job while the non-union men are at work. If injury to the prime contractor would under these circumstances destroy the right to picket, Sec. 8, thus construed, would prevent craft unions picketing at all in any effective manner and the Act clearly did not so intend. Also, it would violate the free-speech protections of the First Amendment and Section 8(c) of the Act.

We also invite this Court's attention to the fact that in the present case there are two independent grounds of decision adequate to support the judgment below. The Court below refused to disturb the assertion of jurisdiction by the Board as to interstate commerce, a putative 65 per cent of $348.55 of materials (Op. below R. 267) though it said "decision in this regard is a close one." (R. 267). Likewise, the Court below overruled Respondent's plea of *res judicata* as to lack of interstate commerce, the District Court in Colorado having so held in injunctive proceedings

pending final adjudication by the Board. (Op. below, R. 270-1).

In the event this Court should grant certiorari herein we propose to argue the Court below was in error in both these rulings.

Respectfully submitted,

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